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IN THE SUPREME COURT OF THE STATE OF IDAHO
2004 Opinion No. 107

SHAWN L. MCGRIFF,

Plaintiff-Respondent,

v.

THERON W. MCGRIFF,

Defendant-Appellant.

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Docket No. 28910

Appeal from the District Court of the Seventh Judicial District of the State of Idaho,
Bonneville County. Hon. L. Mark Riddoch, Magistrate Judge.

Expedited review of a magistrate judge's custody determination. Affirmed in part,
reversed in part and remanded.

Racine, Olson, Nye, Budge & Bailey, CHTD, Pocatello, for appellant. Richard A. Hearn
argued.

Holden Kidwell Hahn & Crapo, PLLC, Idaho Falls, for respondent. Marie T. Tyler
argued.

The Idaho Supreme Court affirmed in part and reversed in part a magistrate court's order
awarding legal and physical custody of children and an order to pay child support.

After a trial, the magistrate court awarded legal and physical custody of the children to
Shawn, the children's mother; ordered Theron, the children's father, to pay child support to
Shawn; and ordered Theron to assist in paying Shawn's attorney fees on appeal. On appeal, the
Supreme Court found the magistrate's findings that the children were having difficulty handling
the twice weekly change of residence and that Theron was continuing to refuse to communicate
directly with Shawn in any way, provided a sufficient basis to examine the best interests of the
children and consider a modification of the custody arrangement. The Court held that sexual
orientation, in and of itself, cannot be the basis for awarding or removing custody; only when the
parent's sexual orientation is shown to cause harm to the child, such that the child's best interests
are not served, should sexual orientation be a factor in determining custody.

The Supreme Court also found there was sufficient evidence in the record to support the magistrate's conclusion that Shawn was best suited for sole legal and physical custody of the children. As to visitation, the magistrate did not abuse his discretion in ordering that Theron's male partner not be residing at the home when the children were visiting because the partner's involvement had been shown to be detrimental and to pose a valid danger of alienating the children's affections toward their mother.

As to attorney fees on appeal, the Supreme Court found that although the magistrate was within his discretion in awarding attorney fees to Shawn, he should have determined what he believed would be a reasonable amount to be paid by Theron according to Idaho Code § 32-704(3), instead of leaving the amount to be paid open-ended. The Supreme Court vacated and remanded Shawn's attorney fee award back to the magistrate for a determination of what a reasonable attorney fee would be.

Justice Eismann concurred in the result of the Court's decision.

Justice Kidwell dissented, arguing the decision of the magistrate should be reversed because the record reflects an abuse of discretion since Theron's sexual orientation was wrongfully taken into consideration.